ECORD
AND
RIEFS

No. 15-1439

IN THE
Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

INTRODUCTION

Petitioners and the United States see eye to eye on the need for this Court's review in this case. As the United States explains, the question presented has generated substantial confusion in the lower courts, and this is the right case for resolving it. Indeed, any objection to this case as a proper vehicle is unfounded: The original proceeding that petitioners initiated in the California Court of Appeal resulted in a final judgment based on federal law, which this Court has jurisdiction to review.

Petitioners and the United States do part ways on the merits. While petitioners maintain that the Securities Litigation Uniform Standards Act

(SLUSA) divests state courts of jurisdiction over covered class actions alleging only claims under the Securities Act of 1933 (1933 Act), the United States contends that SLUSA merely authorizes a subset of such actions to be removed to federal district court. But even on the United States' account, many district courts are misapplying SLUSA, remanding certain covered class actions to state court that should remain in federal court. *See, e.g.*, *Elec. Workers Local #357 Pension & Health & Welfare Trs.* v. *Clovis Oncology, Inc.*, 185 F. Supp. 3d 1172, 1176, 1177-1178 (N.D. Cal. 2016). This Court's review is therefore necessary to resolve, once and for all, the legal debate over where covered class actions alleging only 1933 Act claims should be heard.

The petition for certiorari should be granted.

ARGUMENT

I. THE UNITED STATES AGREES THAT CERTIORARI SHOULD BE GRANTED IN THIS CASE

The United States agrees that the question presented warrants this Court's review, and that this case is an appropriate vehicle for that review. U.S. Br. 17-22. Certiorari should be granted.

1. The brief filed by the United States reiterates what petitioners have maintained all along: The question presented meets all the criteria of an issue meriting this Court's review. The question presented arises with "frequency." *Id.* at 19; *see* Reply to Br. in Opp. 1. It is the subject of "substantial" and "ongoing confusion in the lower courts." U.S. Br. 17, 19; *see* Pet. App. 25a-28a; Reply to Br. in Opp. App. 1a. And given the "significant obstacles to appellate resolution of the question presented," U.S. Br. 18,

there is no point in waiting for "a conflict among federal courts of appeals or state courts of last resort." *Id.* at 19; *see* Pet. 13-15, 20; Reply to Br. in Opp. 1-3. Indeed, a circuit split is even less likely to develop now that district courts have begun sanctioning defendants for removing suits like this one to federal court. *See Iron Workers Mid-S. Pension Fund* v. *Terraform Glob., Inc.*, No. 15-cv-6328, 2016 WL 827374, at *5-6 (N.D. Cal. Mar. 3, 2016) (remanding the case and awarding attorney's fees and expenses to the plaintiff after finding that the defendants "lacked an objectively reasonable basis for seeking removal"). This case thus presents a rare opportunity to resolve "an important question of federal law that has not been, but should be, settled by this Court." U.S. Br. 19 (quoting S. Ct. R. 10(c)); *see* Pet. 10.

2. As the United States confirms, this case is also a proper vehicle for this Court's review.

a. The petition seeks review of a "[f]inal" state-court judgment under 28 U.S.C. § 1257(a). The United States correctly explains why, *see* U.S. Br. 19-21, and petitioners urge this Court to adopt that reasoning instead of the reasoning found in the petition and reply. Petitioners did not *appeal* the California Superior Court's decision denying their motion for judgment on the pleadings for lack of jurisdiction. Rather, they initiated an *original* proceeding in the California Court of Appeal by filing a petition for a writ of mandate, prohibition, or other relief. Pet. App. 15a, 32a. That distinct proceeding reached final judgment under Section 1257 when the Court of Appeal denied the petition and the Califor-

nia Supreme Court denied discretionary review. *Id.* at 15a-16a.[1]

This Court has made crystal clear that finality exists in these circumstances: "The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment within the meaning of section 237(a) of the Judicial Code," the predecessor to Section 1257. *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931); *see also Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954) ("The [California] Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257."); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 565 (1947); Stephen M. Shapiro et al., *Supreme Court Practice* ch. 3.8, at 171-172 (10th ed. 2013). It makes no difference whether "further proceedings are to be had in the lower court"; "[a] judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final" all the same. *Fisher* v. *District Court*, 424 U.S. 382, 385 n.7 (1976) (per curiam). This Court therefore has jurisdiction under Section 1257 to review the judgment in this case.

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[1] In their certiorari petition and reply, petitioners mistakenly suggested that the California Court of Appeal denied discretionary appellate review in this case. *See* Pet. 16; Reply to Br. in Opp. 4. In filing a petition for a writ of mandate, prohibition, or other relief in the Court of Appeal, petitioners were initiating an original proceeding, not seeking discretionary appellate review. That is why the Superior Court itself was a respondent in the Court of Appeal and the California Supreme Court. Pet. ii. The Superior Court is also a respondent in this Court; the certiorari petition incorrectly said that it is not. *Id.*

b. That judgment, moreover, does not rest on any adequate or independent state ground. Though the Court of Appeal's summary order offers no explicit rationale, Pet. App. 15a, "other parts of the record" establish that the decision rested on the merits of the federal question presented here. Shapiro et al., *supra*, ch. 3.23, at 211, *quoted in Foster* v. *Chatman*, 136 S. Ct. 1737, 1746 n.3 (2016).

To begin, this Court should presume that the Court of Appeal's summary order rested on the same federal ground as the California Superior Court's decision. *See Foster*, 136 S. Ct. at 1746 n.3. *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991), is instructive. There, as here, a petition for an extraordinary writ was filed in a California appellate court, initiating an original proceeding. *Id.* at 800. The California appellate court denied the writ in a summary order without opinion. *Id.* This Court looked through to the "last *explained*" state-court judgment, *id.* at 805—a decision by a lower California court in a distinct proceeding, *id.* at 806—and presumed that the summary order rested on the same ground, *see id.* at 804.

Here, the last explained state-court judgment is the California Superior Court's decision. *See* Pet. App. 1a, 5a-6a. That decision rested entirely on *Luther* v. *Countrywide Financial Corp.*, 125 Cal. Rptr. 3d 716 (Ct. App. 2011), which in turn addressed only the federal question presented. Looking through to the Superior Court's decision, this Court should presume that the Court of Appeal's decision rested on the same federal ground. *See Shaw* v. *Superior Court*, 393 P.3d 98, 102-104 (Cal. 2017) (reaffirming that challenges to a California trial court's jurisdiction may be reviewed prior to trial by a petition for an extraordinary writ).

That presumption is strengthened by the substance of what the parties argued below. In the Court of Appeal, petitioners' memorandum in support of their petition for a writ of mandate, prohibition, or other relief addressed only the Superior Court's jurisdiction under SLUSA. *See* Pet. for a Writ of Mandate and/or Prohibition or Other Relief 17-35 (Dec. 2, 2015). Respondents did not file a response and thus did not inject any state-law issue. After the Court of Appeal denied the writ, petitioners filed a petition in the California Supreme Court, seeking review of only the federal question presented. *See* Pet. for Review 7-27 (Dec. 18, 2015). Notably, respondents' opposition addressed only that federal question, too. Answer to Pet. for Review 1-15 (Jan. 7, 2016). Thus, throughout this original proceeding, the California courts had only the federal question before them.

Given *Countrywide*, the Superior Court's decision, and the parties' arguments below, the record points to only one conclusion: that the judgment below rested on the federal question presented. This Court has previously exercised jurisdiction in similar circumstances. *See Mich. Cent. R.R.* v. *Mix*, 278 U.S. 492, 494 (1929) (exercising jurisdiction over the denial of an "application for a writ of prohibition * * * without an opinion"); *cf. Bd. of Educ.* v. *Superior Court*, 448 U.S. 1343, 1344, 1346 (1980) (Rehnquist, J., in chambers) (explaining that the Court "would in all probability have jurisdiction" to review the denial of a "petition for a writ of mandamus and/or prohibition" "without opinion"). It should do so again here. In the words of the United States, this case is an "appropriate" vehicle for review, U.S. Br. 22, and this Court is "unlikely to be presented" with a better one, *id.* at 19.

II. PETITIONERS' INTERPRETATION OF THE RELEVANT STATUTORY PROVISIONS IS STILL THE MOST NATURAL

On the merits, the United States contends that "the California trial court correctly held that SLUSA did not divest it of jurisdiction over respondents' 1933 Act suit." U.S. Br. 6. The United States insists, though, that 1933 Act suits like this one are not stuck in state court. *Id.* at 13. Rather, according to the United States, SLUSA permits such suits to be removed to federal court. *Id.* at 13-17.

As an initial matter, petitioners agree with the United States that, in resolving the question presented, the Court can consider the overall statutory scheme, including Sections 77p(b) and (c) and Section 77v(a)'s provisions regarding jurisdiction and removal. U.S. Br. 6; *see* 15 U.S.C. §§ 77p(b), 77p(c), 77v(a). All of those provisions are implicated by this case; the interpretation of any one provision is informed by the interpretation of the others. *See* U.S. Br. 15 n.3. This case thus presents the Court with an opportunity to fully resolve the legal debate over where covered class actions alleging only 1933 Act claims should be heard.

Petitioner also agree with the United States that "the efficac of [the Private Securities Litigation Reform Act's substantive and procedural] requirements depends on defendants' access to a federal forum." *Id.* at 13. By contrast, respondents maintain that if a suit like this one were filed in state court, it would be stuck there; it could be neither dismissed for lack of jurisdiction nor removed to federal court. *See* Br. in Opp. 16-17, 21-22. The United States' position at least has the virtue of

permitting some covered class actions alleging only 1933 Act claims to be removed to federal court—contrary to the decisions of numerous district courts. *See Elec. Workers Local #357*, 185 F. Supp. 3d at 1176, 1177-1178 (collecting cases).

But while the United States' reading of the relevant provisions is more faithful to the statutory scheme than respondents', it is still not the best reading. That is because the United States distorts the meaning of the "except" clause of Section 77v(a) and the section it cross-references, Section 77p. According to the United States, "[t]he 'except' clause makes clear that * * * state courts may not entertain any state-law claims barred by Section 77p(b)" in "hybrid class actions that contain both 1933 Act claims and state-law claims within the scope of Section 77p(b)." U.S. Br. 11-12. But as the United States acknowledges, the "except" clause is "a limit on the concurrent *jurisdiction* of *state* courts." *Id.* at 8 (emphases added); *see also* 15 U.S.C. § 77v(a) (addressing the concurrent "*jurisdiction*" of "*State* and Territorial courts" (emphases added)). Section 77p(b), by contrast, is about "*preclusion*." *Kircher* v. *Putnam Funds Tr.*, 547 U.S. 633, 636 n.1 (2006) (emphasis added). It "makes some state-law claims nonactionable," *id.*, whether brought in "State *or* Federal court," 15 U.S.C. § 77p(b) (emphasis added). The United States would thus employ a provision about *preclusion* in *any* court as the basis for an exception to *jurisdiction* in *state* court. Congress could not have meant to mix such apples and oranges. *See Kircher*, 547 U.S. at 646 (distinguishing "jurisdiction" from "preclusion"); U.S. Br. 7-8 (acknowledging that Section 77p(b) "does not limit the

concurrent state-court jurisdiction over 1933 Act claims that Section 77v(a) generally provides").[2]

Rather, what Congress meant to do is more straightforward: divest state courts of jurisdiction over "covered class actions" as defined in Section 77p. The United States objects that Section 77p itself does not "'provide[]' an exception to the general rule of concurrent jurisdiction." U.S. Br. 8. But what Section 77p does "provide[]" is a definition of "covered class actions." *See* 15 U.S.C. § 77p(f). And it is that definition that Congress intended to cross-reference when it divested state courts of jurisdiction over "covered class actions" "as provided in section 77p." *Id.* § 77v(a).[3]

In short, petitioners offer the most natural reading of the relevant statutory provisions: The "except"

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[2] The United States also says that the "except" clause might have been added "in a more general excess of caution, as a way of ensuring that nothing in the 1933 Act's general jurisdictional provision would be taken to supersede SLUSA's limits on state-court jurisdiction." U.S. Br. 12. It is unclear what the United States means by "SLUSA's limits on state-court jurisdiction," besides the "except" clause itself. If the United States means Section 77p(b), it has once again conflated preclusion with jurisdiction.

[3] According to the United States, certain covered class actions alleging only 1933 Act claims may be removed to federal court because they fall within the exception to the removal bar in the penultimate sentence of Section 77v(a). U.S. Br. 13. That exception reads: "[e]xcept as provided in section 77p(c) of this title." 15 U.S.C. § 77v(a). If the United States is willing to construe that exception to apply to certain covered class actions alleging only 1933 Act claims, there is no reason it should not be willing to construe the similarly worded "except" clause of the first sentence of Section 77v(a) to apply to the same covered class actions, including respondents' suit in this case.

clause divests state courts of jurisdiction over "covered class actions" alleging only 1933 Act claims. The California Superior Court in this case thus lacked jurisdiction over respondents' 1933 Act suit. This Court should grant review and reverse the judgment of the California Court of Appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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